

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTOINE DEION MCKINNEY,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 265532

Wayne Circuit Court

LC No. 05-002338-01

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of possession of marijuana, MCL 333.7403(2)(d), and possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant to serve concurrent terms of incarceration of time served for the marijuana conviction, and five to twenty years for the cocaine conviction. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument in accordance with MCR 7.214(E).

Accordingly to police testimony, defendant was stopped for speeding, and the police detected the smell of marijuana emanating from his car. A search of the vehicle turned up the “end of a marijuana blunt which had already been smoked,” two baggies of cocaine, and a bundle of United States currency totaling \$1,355. Defendant testified that he did not place the two baggies of cocaine in the car, but that he had allowed his cousin, now deceased, to use the car earlier that day.

On appeal, defendant argues that the police denied him a fair trial by failing to produce their videotape of the traffic stop in question. Defendant also challenges the validity of convicting him of one count of possessing all the cocaine in the two separate baggies, as opposed to two lesser convictions in connection with each smaller quantity.

I. Police Videotape

The day before trial, defense counsel reported that predecessor counsel had subpoenaed the police for the vehicular pursuit tape that recorded the traffic stop that engendered this case, and that defense counsel thereafter persuaded the trial court to order the tape preserved, but that no tape was ever provided. Defense counsel asked the trial court to consider dismissal on the

ground that the tape could have shed light on the police witnesses' credibility. The court took the motion under advisement, but elected not to dismiss.

"This Court reviews a trial court's ruling regarding a motion to dismiss for an abuse of discretion." *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1999). Where a defendant seeks appellate relief on the ground that he was prejudiced by missing evidence, "[d]efendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

In this case, there is no suggestion that the videotape would be exculpatory. The defense was not that the police did not find the cocaine and marijuana in defendant's car, but rather that someone other than defendant placed the substances in the car. The video document would have shed no light on that defense. Moreover, although the evidence revealed some possible inadvertence on the part of the police in response to the request that the tape be preserved and surrendered, it revealed no bad faith on their part.

For these reasons, the trial court did not abuse its discretion in declining to dismiss the case for want of the videotape.

II. Quantities of Cocaine

In a pretrial motion, defendant sought to have the two quantities of cocaine found in his possession characterized as wholly separate from each other, thus limiting his exposure to criminal liabilities to those attendant for quantities under 50 grams. But the trial court rejected this argument, and treated all the cocaine in the aggregate. Defendant argues that because the police recovered two distinct quantities of cocaine of less than 50 grams each, that those two should not have been considered as a single quantity for purposes of proceeding against him. We disagree.

Defendant presents this issue as a challenge to the sufficiency of the evidence. When reviewing sufficiency challenges, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Review is de novo. *Id.* Statutory interpretation likewise presents a question of law, calling for review de novo. See *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997). The purpose of statutory interpretation is to give effect to the intent of the Legislature. *Id.* at 699.

MCL 333.7401(2)(a)(iv) prescribes the penalty for trafficking in cocaine "in an amount less than 50 grams, of any mixture containing that substance," and MCL 333.7401(2)(a)(iii) prescribes potentially more severe penalties for doing so "in an amount of 50 grams or more, but less than 450 grams, of any mixture containing that substance" In this case, the parties stipulated that the cocaine was packaged in quantities respectively of 46.94 grams and 12.9 grams. Defendant thus hopes to avoid running afoul of MCL 333.7401(2)(a)(iii) by characterizing the quantities of cocaine found in his possession as constituting two lesser offenses. This argument is without merit.

In *People v Cortez*, 131 Mich App 316, 331-332; 346 NW2d 540 (1984), remanded on other grounds 423 Mich 855 (1985), a defendant who was found hiding in a closet with a bag of just over 550 grams of cocaine, and found in constructive possession of a similar amount on a nearby table, was properly charged and convicted for the aggregate of all quantities of cocaine. Defendant attempts to distinguish this case from *Cortez, supra*, on the ground that the amounts in the two baggies were dissimilar, as were details of wrapping, size, and type of cocaine involved. But the two baggies were found hidden in the same part of defendant's car, and no evidence other than dissimilarities of packaging indicates that these stemmed from wholly separate transactions but for coincidentally being stored in the same place. We conclude that the trial court correctly proceeded on the basis of the aggregate quantity from those two baggies.

A different result would frustrate legislative intent, in that "drug dealers could protect themselves against exposure to serious criminal charges by simply dividing their drugs into a large number of small packages." *Cortez, supra* at 332. We take this opportunity to reiterate that "[n]othing in the statute suggests that the Legislature intended such an absurd result." *Id.*

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly